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BOOK REVIEW

THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES. By Joseph C. Goulden.¹ New York: Weybright and Talley. 1974. Pp. 375.

Reviewed by Joseph Borkin²

A little over a dozen years ago, Senator Estes Kefauver, a member of the Senate Judiciary Committee, requested the Library of Congress to send to him a representative collection of books on judicial corruption. Since Kefauver's election to Congress in 1938, three federal judges had been charged with selling their decisions: Martin T. Manton of the United States Court of Appeals for the Second Circuit, J. Warren Davis of the Third Circuit, and Albert W. Johnson of the Middle District of Pennsylvania. All were indicted, and all resigned in disgrace to avoid impeachment by Congress. Manton was convicted and spent two years in prison, Davis went through the ordeal of two criminal trials but was finally spared by hung juries, and Johnson was acquitted though his alleged corruption may have been the most grotesque. Probably the best informed legislator on the subject of judicial impropriety, Kefauver had been the chairman of the subcommittee which held extensive hearings on Judge Johnson's impeachment.³ He had expected to find some books, or at the very least a law journal devoted to the conduct of these venal judges and the implications of their improprieties for the development of the law. What, for example, was the impact of a corrupt judge's decision on the principle of stare decisis?

To the senator's utter amazement, the Library of Congress reported that there was not a single definitive work on the subject, not a book, not a law

1. Mr. Goulden is a freelance journalist based in Washington, D.C.

2. Member of the District of Columbia Bar. B.S., New York University, 1933; M.A., George Washington University, 1937. The reviewer is the author of *THE CORRUPT JUDGE* (1962) and chairman of the Federal Bar Association's Committee on Judicial Standards and Conduct.

3. See *Hearings Pursuant to H.R. 138 Before the House Comm. on the Judiciary*, 79th Cong., 1st Sess., ser. 11 (1945).

journal article. Apparently, judicial impropriety was a subject legal scholars avoided, as though examining the disease somehow increased its contagion.

Since then a number of books have appeared in the United States and England dealing with the subject.⁴ The most recent, *The Benchwarmers: The Private World of the Powerful Federal Judges*, is a book of extraordinary scope and breathtaking revelation. Its aim is to describe and analyze the conduct of federal judges, their improprieties and virtues, their strengths and weaknesses. Joseph Goulden has constructed for this task an enormous canvas on which to sketch his portraits. It is far too large for any single individual to cover with any reasonable thoroughness. Confronted with more than 500 federal judges, a diligent and committed legal scholar would have dissolved in frustration from the sheer magnitude of the task.

But Goulden is not a legal scholar. He is a journalist, and one of the best of the breed. Approaching his task pragmatically, he set reasonable guidelines. Canvassing the conduct of judges in every district and circuit of the federal courts, he framed his subject by ascertaining the best and the worst judges now sitting. These judges became the specimens of his most intensive examination and clearly the most engaging part of his book. In between, however, he includes in his survey many other judges to illustrate wisdom, foolishness, drunkenness, bizarre conduct bordering on the psychotic, conflicts of interest (both financial and ideological), as well as the judges who bring honor to the judicial system. The result is an overview of the federal judiciary that no President, no judge, no legislator, and no lawyer should fail to read.

Books have an honored place in the history of political and social reform. *The Jungle* by Upton Sinclair, *Merchants of Death* by H. C. Engelbrecht and F. Hanighen, *Uncle Tom's Cabin* by Harriet Beecher Stowe, and *Unsafe at Any Speed* by Ralph Nader are but a few which come to mind. *The Benchwarmers* is of that genre; it is possible that in time it will take its place among them. Although the book does not have the analytical depth or careful scholarship of another recent book on the judiciary, *The Appearance of Justice* by John MacKenzie, the Washington Post's judicial reporter, its scope is far broader and its specific detail gets closer to the bone. Goulden is not deterred by the traditional reluctance to examine specific facts about specific judges, facts often known to every fellow judge and every lawyer who practices in the errant judges' courts. More often than not the book includes the kind of details which are whispered around the courts but are rarely revealed to the general public, due in large part to a deliberate attempt to keep the public ignorant. Goulden's disclosures, therefore, are eyeopeners.

4. The best of this group includes D. JACKSON, *JUDGES* (1974), J. MACKENZIE, *THE APPEARANCE OF JUSTICE* (1974), and R. SHOGAN, *A QUESTION OF JUDGMENT* (1972).

In presenting his material, Goulden's thesis is quite simple:

Federal judges are of political origin, and when they ascend to the bench they remain humans, and are not magically transformed into omnipotent oracles. Who *are* the federal judges? How do they get their positions? What philosophical baggage do they carry with them? What extra-judicial forces affect their decisions? How do the judges behave, professionally and personally, when they gain power?

(pp. 9-10).

Having set his guidelines, Goulden proceeds to dredge up material about a variety of federal judges which will leave the reader, depending upon his own experience, background, and ideological predisposition, surprised, frightened or incredulous. His recitation of the conduct and character of some of the federal judges in Oklahoma (pp. 206-49) and Illinois (pp. 114-57) border on the unbelievable. I can assure you from my own observations, however, that they are true and not overdrawn. A few paragraphs that Goulden writes about Judge Julius Hoffman are worth quoting:

Julius Hoffman, so far as I could determine in two years' work, is the only federal judge in the Republic with a praiseful billboard in his court. It is a poster-sized blowup of an excerpt from the *Congressional Record* of May 7, 1970, a speech by the then-Senator Ralph Tyler Smith (R., Ill.), at a dinner honoring Hoffman as the VFW's Man of the Year in Illinois. The speech covers several thousand effusive words One paragraph gives the tenor:

Judge Julius Hoffman symbolizes to me—to all of us who honor him here tonight—everything that is great and good in our system, and at the same time, that expand and improve it for all mankind. He symbolizes the fact that law and order, in every definition of the phrase, is our first and best line of defense against the destroyers in our midst . . . and I am sure you join me as we all say sincerely, "God bless you, Julius Hoffman. . . ."

(pp. 137-38).

After describing Judge Hoffman's conduct as erratic, Goulden asks the relevant question—and suggests an answer. "How does such a misanthrope manage to cling to the bench? . . . Much of the answer, I concluded, lies in the fact that many Chicago lawyers and judges are frightened by Hoffman" (p. 141).

Yet compared to some other judges described by Goulden, Hoffman is of relatively lesser significance. His recital regarding the Oklahoma federal judges, particularly Stephen Chandler, stands as the most severe indictment of a system that seems unable to cope with an unfit judge.

But between Judges Hoffman and Chandler at one extreme and Judges David Edelstein of the Southern District of New York, Pierson Hall of the Central District of California, and John Sirica of the District of Columbia, the author's favorites, at the other, lies a vast gulf filled with judges of almost infinite variety. Goulden is, therefore, compelled by the very mass of the material to make choices and judgments which frequently are without solid basis. One weakness is his reliance in some instances on statements by lawyers who insist on anonymity. Yet even that reservation underscores Goulden's point that fear of retaliation is a factor protecting tyrannical, drunken, and near psychotic judges.

In his discussion of attempts at reform Goulden outlines the late Chief Justice Earl Warren's moves after the Abe Fortas scandal (pp. 340-41). During the June 1969 meeting of the Judicial Conference, Warren prepared a resolution drastically limiting the kind of outside income earned by judges and requiring the filing of "investments and other assets held by him at any time during the year" in addition to liabilities and an itemization of income. Bowing to Warren's prestige and the pressures generated by the Fortas disclosures, the Judicial Conference "after considerable (but closed-door) debate" passed the resolution (p. 340).

Shortly after Warren retired, the Judicial Conference scrapped the Warren resolution. Except for requiring reports of payments of more than \$200 for nonjudicial services, it abandoned the requirement to report all income, liabilities, and assets. Goulden, however, noted with approval the creation by the Judicial Conference of an interim advisory committee on judicial activities to give opinions upon request regarding the nonjudicial activities of judges. As of now, under the chairmanship of Judge Elbert P. Tuttle of the Fifth Circuit, the committee has handed down some forty opinions.⁵

Judicial reform has moved a step forward in the past year with the adoption by the American Bar Association of a new Code of Judicial Conduct to replace the code of 1924. With only slight modification the Judicial Conference has incorporated the new code into its own rules. The provisions regarding financial disclosure,⁶ however, are still inadequate. They call for a judge to reveal his income but not his assets, liabilities, and net worth—much more vital information in determining a judge's conflict of interests and financial vulnerability. The wild corruption of Manton and Davis, for example, did not begin until they became insolvent and were driven by financial desperation to sell their "justice."

5. The opinions are published under the title *The Judicial Conference Advisory Opinions*.

6. See ABA CODE OF JUDICIAL CONDUCT, Canon 6.

The provision in the new canons on the subject of the disqualification of judges also contains a serious flaw. Canon 3, entitled "Remittal of Disqualification", provides that a judge

may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record.

One does not have to be a profound legal philosopher to notice the built-in possibility for abuse contained in this section of the new canons. Imagine the response of some of the more cantankerous and tyrannical judges catalogued in *The Benchwarmers* looking down upon a lawyer bold enough to challenge the judge's estimate of whether his financial interest is insubstantial or his relationship immaterial.

A concerned Congress has now taken remedial action, and on December 5, 1974, President Ford signed into law an amendment to section 455 of Title 28 broadening the grounds for judicial disqualification.⁷ In the new law the area in which the disqualification of a justice or a judge may be waived by the parties is considerably narrowed. Its relevant clauses provide, unlike Canon 3 of the Judicial Code, that no party may waive the disqualification of a justice or a judge in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually, or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the pro-

7. Pub. L. No. 93-512, 88 Stat. 1609 (U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess. 1852 (Jan. 30, 1975)).

ceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

- (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
- (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.⁸

In any other cases, however, in which the judge's impartiality "might be reasonably questioned," the parties may still waive the disqualification.⁹

The problem of removing unfit justices and judges continues to be a concern of the Congress. Currently, the only way a justice or a judge may be removed is by the impeachment process set forth in the Constitution. This simply means that the entire House of Representatives, generally after protracted hearings before its Judiciary Committee, votes on the impeachment resolution. In the event impeachment is voted, the Senate sits as a court, a procedure which may take weeks, even months. As a result Congress is hesitant to halt the legislative function of the federal government in order to consider the removal of a judge. As the adage says, it "requires a cannon to kill a fly."

From the Eighth Congress, when Congressman John Randolph introduced a proposed amendment to the Constitution providing that justices and judges of federal courts "shall be removed by the President on the joint address of both Houses of Congress," to the present Congress, the drive to find a method better than impeachment to remove an unfit or corrupt judge has continued.

In 1937 the prognosis looked good for a time. Halton Sumners, Chairman of the House Judiciary Committee, with the support of the American Bar Association, introduced a bill to substitute, in effect, trial by the Senate with a trial before three judges of the Circuit Court of Appeals appointed by the Chief Justice of the United States. The bill actually passed the House but died in the Senate. The same bill with the added support of Attorney General Francis Biddle did no better. The opponents successfully concentrated their attack on the bill's constitutionality.

In the present Congress, Senator Sam Nunn has introduced a bill calling for the creation of a Council on Judicial Tenure, the members of which would

8. *Id.* § (b).

9. *Id.* § (e).

be elected by their fellow judges from the various federal courts.¹⁰ After a proper investigation the Council would have the power to dismiss the complaint about a judge or send it up to the Judicial Conference with a recommendation for appropriate discipline such as censure or removal.

Senator Nunn's bill follows the pioneering attempts of former Senator Joseph Tydings at judicial reform and is modeled after the California Commission on Judicial Qualifications.¹¹ An argument in support of its constitutionality has appeared in a recent article in the American Bar Association Journal.¹²

Further attempts at improvement will also be spurred by books like *The Benchwarmers*. I should like to suggest to the author and his publisher that they consider bringing out successive editions as the changes in the federal judiciary warrant, not unlike the *Making of the President* series by Theodore H. White. It will perform a needed and useful service, and Goulden has shown the right combination of courage and talent to do it.

10. See S. 1110, 94th Cong., 1st Sess. (1975).

11. See CAL. GOV'T CODE § 68702-55 (West 1968).

12. See Boyd, *Federal Judges: To Whom Must They Answer?*, 61 A.B.A.J. 324 (1975).